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In the Supreme Court of the United States

OCTOBER TERM, 1977

BRONZIE L. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 566 F. 2d 1265.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1978. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 20, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a warrant-authorized entry into petitioner's house-trailer violated 18 U.S.C. 3109.

2. Whether the trial court erred by giving an *Allen* charge after the jury announced that it was deadlocked.

3. Whether, in the circumstances of this case, petitioner is entitled to a new trial because government agents did not testify candidly concerning their relationship to a government witness.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of one count of distribution of a controlled substance (heroin), in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of 10 years' imprisonment, to be followed by consecutive special parole terms of three years each. The court of appeals affirmed (Pet. App. 1a-15a).

The government's evidence showed that during the summer and fall of 1975, agents from the Drug Enforcement Agency (DEA) and officers from the Orlando, Florida, Police Department were investigating a heroin distribution chain in which petitioner supplied drugs to Terri Ovitt, who in turn sold them to Anthony Italiano (Pet. App. 3a).[1]

At approximately 11:40 p.m. on October 29, 1975, 16 officers from the DEA and the local police went to petitioner's house-trailer to execute a search warrant for heroin (Pet. App. 3a). As he drove toward the trailer, DEA Agent Porter observed a man come out of the

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[1]Italiano was tried and convicted on seven counts of distribution of heroin (Pet. App. 5a-6a). Ovitt was granted immunity from prosecution (Tr. 113-117) and testified at petitioner's trial.

trailer door and run away from the approaching officers (Pet. App. 3a; H. Tr. 101-102).[2] Porter stopped his car 15 or 20 feet from the trailer (H. Tr. 102) and then ran from the car to the trailer shouting "Sheriff's Department with a search warrant" (H. Tr. 102). As he reached the trailer door (which was partially open), he again shouted "Sheriff's Department with a search warrant" (H. Tr. 123, 103, 108). Porter testified that he heard someone inside yell, "It's the cops," and the sound of people running away from the door (H. Tr. 123, 103; Pet. App. 3a). Porter then entered the trailer and proceeded down the hallway towards a bathroom where he heard the sound of a toilet being flushed (H. Tr. 104). He opened the bathroom door and observed petitioner and another person by the toilet. He noticed a clear plastic bag fall to the floor in front of the toilet (H. Tr. 104-105; Pet. App. 3a). Traces of heroin were found on the seat of the toilet and in the water of the toilet (Tr. 328-330, 385-386, 397-398; Pet. App. 3a-4a).

The agents then searched the trailer pursuant to the warrant and seized narcotics and assorted narcotics paraphernalia (Pet. App. 3a-4a).

Petitioner filed a motion to suppress the evidence seized during the agents' search, alleging that Porter violated the provisions of 18 U.S.C. 3109 by failing to announce his authority and purpose and to await admittance before entering the trailer. The district court denied the motion, and the evidence was admitted at petitioner's trial (see Pet. App. 5a).

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[2]"H. Tr." refers to the transcript of the hearing on petitioner's motions to suppress certain evidence and to dismiss the indictment against him.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that Agent Porter's entry into his trailer to execute the search warrant violated 18 U.S.C. 3109, which provides that an "officer may break open any * * * door or window of a house * * * to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance." Although Agent Porter announced his identity and purpose as he ran toward the trailer, and again as he reached the doorway, he entered the partially open door without waiting to see if he would be refused admittance. The court of appeals affirmed the district court's conclusion that any departure from Section 3109 was justified by the exigent circumstances (Pet. App. 5a).

We note at the outset that Section 3109, which concerns breakings, does not apply in this case at all. The record shows that the door to the trailer was *ajar* when Porter reached it (Pet. App. 3a). Accordingly, his entry was not a "breaking" of any kind. See, *e.g.*, *United States* v. *Morell*, 524 F. 2d 550, 556 (C.A. 2); *United States* v. *Lopez*, 475 F. 2d 537, 540-541 (C.A. 7); *United States* v. *Johns*, 466 F. 2d 1364 (C.A. 5); *United States* v. *Syler*, 430 F. 2d 68, 70 (C.A. 7); *Vanella* v. *United States*, 371 F. 2d 50, 58 (C.A. 9), certiorari denied, 386 U.S. 920; *United States* v. *Conti*, 361 F. 2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams*, 351 F. 2d 475 (C.A. 6); *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[3] Cf. *United*

[3]The District of Columbia Circuit, alone among federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States*, 289 F. 2d 894. This case has been explicitly rejected by other courts of appeals. See *Ng Pui Yu* v. *United States*, 352 F. 2d 626 (C.A. 9); *Vanella* v. *United States, supra*, 371 F. 2d at 58 n. 2. It also appears to be inconsistent with the language of 18 U.S.C. 3109 and unsupported by any rationale for such a rule.

States v. *Bradley*, 455 F. 2d 1181, 1185-1186 (C.A. 1), affirmed, 410 U.S. 605. Other cases are collected in Annotation, *What Constitutes Violation of 18 U.S.C. § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant*, 21 A.L.R. Fed. 820, 881-884 (1974). These cases are consistent with the language of Section 3109, which conditions the power of an officer to "break open any outer or inner door or window of a house" in order to make an authorized search or arrest. *Sabbath* v. *United States*, 391 U.S. 585, held that the unannounced opening of a closed door was a "breaking" of that door, but here there was no "breaking," since the door was not closed when the agents arrived.

Apart from this point, and contrary to petitioner's argument (Pet. 14-15), the court below did not render Section 3109 a nullity by the announcement of a novel or sweeping exigent circumstances exception. Numerous court of appeals decisions have explicitly recognized that exigent circumstances excuse failure to comply with Section 3109. *E.g.*, *United States* v. *Smith*, 520 F. 2d 74, affirmed after remand, 524 F. 2d 1287 (C.A.D.C.); *United States* v. *Garcia Mendez*, 437 F. 2d 85 (C.A. 5); *United States* v. *Bustamante-Gamez*, 488 F. 2d 4 (C.A. 9), certiorari denied, 416 U.S. 970. See generally Annotation, *supra*, 21 A.L.R. Fed. at 852-860 and cases cited. Moreover, although this Court has not had occasion to rule on the applicability of the exigent circumstances exception to Section 3109, it has noted that "there is little reason" why limited exceptions, including exigent circumstances, would not apply to Section 3109, since they were recognized by the common law, which Section 3109 was intended to codify. *Sabbath* v. *United States*, *supra*, 391 U.S. at 591 n. 8.

The court of appeals' application of the exigent circumstances exception to the facts of this case was proper, and the issue does not warrant further review by this Court.[4] The court noted that Porter, who saw one person leave the trailer and run away, and who heard sounds of running inside the trailer, had reason to believe that the officers' approach had been observed (Pet. App. 5a). Moreover, since he had shouted out his identity and purpose and then heard someone inside the trailer announce it was the "cops," he was justified in being " 'virtually certain' " that the persons inside the trailer knew his purpose (*ibid.*). Finally, since Porter was searching for heroin, a readily disposable item, he was properly concerned that any evidence in the trailer might be quickly destroyed (*ibid.*).

2. After approximately five hours of deliberation, the jury sent a note to the court stating it was unable to reach a verdict (Tr. 510). The jury continued to deliberate for another hour before it was excused for the evening (Tr. 523). At 9:30 a.m. the next morning, after overruling petitioners' objection, the district court delivered an *Allen* charge (Tr. 520-522, 527-530).[5] The jury returned a

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[4]Judge Skelton, concurring specially, stated (Pet. App. 12a) that he found "incredible" Agent Porter's testimony that he was able to hear footsteps of persons running inside the trailer as he approached. He concluded that although he found "only slight evidence of doubtful character in the record that supports the finding of the trial judge that exigent circumstances existed prior to the breaking-in," he was nevertheless bound by those findings (*id.* at 14a-15a). Notwithstanding Judge Skelton's doubts, the resolution of this factual issue by the courts below was supported by the record, including the direct testimony of Agent Porter, which the district court chose to credit, and affords no occasion for further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

[5]The text of the supplemental charge is reproduced as an appendix to this brief.

verdict of guilty on both counts later that morning. Petitioner concedes (Pet. 11) that the charge here "tracked the language of" the instruction approved by the Fifth Circuit in *United States* v. *Bailey*, 468 F. 2d 652, affirmed *en banc*, 480 F. 2d 518, and comparison demonstrates that it followed this Court's opinion in *Allen* v. *United States*, 164 U.S. 492, faithfully.

Petitioner urges (Pet. 10-12) that this Court should resolve an apparent conflict among the courts of appeals regarding the validity of the traditional *Allen* charge and hold the charge to be unconstitutionally coercive. Four courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.); *Government of the Virgin Islands* v. *Hernandez*, 476 F. 2d 791 (C.A. 3); *United States* v. *Chaney*, 559 F. 2d 1094 (C.A. 7). The Fifth Circuit, as noted above, continues to approve the *Allen* charge, *United States* v. *Bailey*, 480 F. 2d 518 (*en banc*). But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Dyba* v. *United States*, No. 76-1731, certiorari denied October 3, 1977; *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

3. Petitioner contends (Pet. 3, 15-19) that he was deprived of due process and a fair trial when "federal law enforcement officers deliberately gave misleading testimony concerning inducements given to a key prosecution witness and the federal prosecutor did not correct the false impression thereby created." In the circumstances of this case, however, the court of appeals correctly determined that the government's lack of candor could not have influenced the jury and, therefore, did not deprive petitioner of a fair trial. *Giglio* v. *United States*, 405 U.S. 150.

The background of petitioner's claim is as follows. When Italiano was arrested on October 29, 1975, he made a plea bargain in which he agreed to testify for the government regarding his heroin source.[6] DEA Agent LePore told Italiano that his cooperation would be reported to the United States Attorney (Pet. App. 5a). Italiano was later told by Officer Kelsey of the Orlando Police Department that his cooperation would be reported to the court as well (*id.* at 6a). In December of 1975, Italiano renounced his plea agreement, and he was subsequently tried and convicted on seven counts of distribution of heroin (*id.* at 5a-6a). While he awaited sentencing, Italiano met with Officer Goode of the Orlando Police Department; Goode promised Italiano that if he testified for the government, he (Goode) would inform the sentencing judge of Italiano's cooperation (*id.* at 6a). Italiano subsequently testified as a government witness. During cross-examination, he stated that he had not been "offered" or "promised" anything in return for

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[6]Italiano was informed that he could be charged with seven counts of distributing heroin, each count carrying a maximum penalty of 15 years' imprisonment (Pet. App. 5a).

his testimony, although he thought "it might go lighter" on him if he testified (Tr. 190-192).[7] He also testified that officers Kelsey and Goode had suggested they would try

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[7]The pertinent portions of Italiano's testimony were as follows (Tr. 190-192):

Q. Mr. Italiano, have you ever been offered anything in return for your testimony today?

A. No, sir.

Q. You have not. Are you saying, then, that by testifying you don't think it is going to do you any good at all?

A. Probably will.

Q. Probably will—in what terms. How do you think it is going to do you some good today?

A. I am not sure.

Q. Well, you have just said you thought it would do you some good.

A. Couldn't hurt.

Q. Couldn't hurt. Could you explain that, please.

A. Well, I have been subpoenaed to testify and I am here and I am testifying.

Q. I understand that. I understand that. But you said you expect you might get some benefit from your testimony today.

A. Benefit?

Q. Yes.

A. I have been convicted of sales of heroin.

Q. So then is that the benefit you are speaking of?

A. That is the possibility of benefit I am speaking of, yes.

Q. So, then, it might go lighter on you if you testify; is that right?

A. Yes.

* * * * *

Q. Have you been promised anything by either Agent

to "help [him] out" if he testified (Tr. 192). Officer Goode testified on cross-examination that he never approached Italiano about "a possible deal in exchange for his testimony" nor did officer Kelsey do so in his presence (Tr. 217). Kelsey testified on cross-examination that he never made any "overtures" to Italiano about what he might be able to do for him if he testified for the government (Tr. 256; Pet. App. 6a).

The district court denied petitioner's motion for a new trial, which was predicated upon the allegation that Italiano, Goode, and Kelsey had testified falsely regarding the inducements offered to secure Italiano's testimony. The district court concluded that Kelsey's and Goode's failure to acknowledge that Italiano had been promised that his cooperation would be made known to the sentencing judge did not warrant a new trial, since there was "no reasonable likelihood" that disclosure of this information would have affected the jury's verdict (Pet. App., 6a).[8] The court of appeals affirmed (*id.* at 5a-8a).

Kelsey or Agent Goode?

A. No.

Q. Now, they have never suggested to you that it would be in your best interest to testify today if they tried to help you out?

A. Yes.

Q. They have done that?

A. Yes, they have done that.

[8]The district court also found that during Italiano's initial plea bargaining, before he renounced the agreement in December of 1975, DEA Supervisor LePore had agreed to notify the prosecutor of Italiano's cooperation if he decided to testify for the government in petitioner's case (Pet. App. 6a).

In *Giglio* v. *United States, supra,* 405 U.S. at 154, this Court held that a new trial was required where a conviction was obtained by the knowing use of false testimony that " 'could * * * in any reasonable likelihood have affected the judgment of the jury * * *,' " quoting from *Napue* v. *Illinois,* 360 U.S. 264, 271. This standard was reiterated in *United States* v. *Agurs,* 427 U.S. 97, 103. The court of appeals held that the district court was correct in concluding that this case was subject to the *Giglio* standard, since the government witnesses had not been "candid" in their responses to defense counsel's questions, and the prosecutor had failed to correct their "evasive testimony" (Pet. App. 7a). Applying that standard, however, it concluded that there was no reasonable likelihood that full and truthful testimony on the dealings between the officers and Italiano could have altered the jury's verdict.

Petitioner asserts (Pet. 17-18) that *Giglio* goes further, requiring a new trial " 'wherever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict.' " *United States* v. *Butler,* 567 F. 2d 885, 890 (C.A. 9). This formulation is incorrect. The *Butler* court apparently misinterpreted the significance of this Court's reference to the jury's "judgment." The jury's judgment is its verdict, and the two terms are often used interchangeably. See, *e.g., United States* v. *Decker,* 543 F. 2d 1102, 1105 (C.A. 5), certiorari denied *sub nom. Vice* v. *United States,* 431 U.S. 906; *United States* v. *Sutton,* 542 F. 2d 1239, 1242-1243 (C.A. 4).

Indeed, in *Giglio* this Court expressly noted that "[w]e do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense *but not likely to have changed the verdict,*' " 405 U.S. at

154, quoting *United States* v. *Keogh*, 391 F. 2d 138, 148 (C.A. 2). The Court reiterated the standard established in *Napue* v. *Illinois*, *supra*, where the conviction had been reversed because the false testimony "may have had an effect on the outcome of the trial." 360 U.S. at 272. However deplorable the use of false or misleading testimony may be, the *Napue* and *Giglio* Courts recognized that, as with other errors of constitutional dimensions, there must be some likelihood of a material effect on the outcome of the trial before grounds exist for ordering a new trial.

Accordingly, the court of appeals correctly stated the issue in this case to be whether there was any reasonable likelihood that misleading testimony about the government's contacts with Italiano might have affected the jury's verdict. See *United States* v. *Sutton*, 542 F. 2d 1239, 1243 (C.A. 4) ("the jury's verdict might have been different had it known"); *United States* v. *Bynum*, 567 F. 2d 1167, 1170 (C.A. 1) (question is "whether * * * it is likely that the outcome would have been different"); cf. *Annunziato* v. *Manson*, 566 F. 2d 410, 414 (C.A. 2) (new trial upheld because truthful testimony "could have created a reasonable doubt that did not otherwise exist").

We agree with the court of appeals' condemnation of the conduct in this case (Pet. App. 8a). Nevertheless, its application of the *Giglio* standard was correct and in any event presents no issue meriting review by this Court. There was an ample factual basis to support the conclusion of both courts below that "a more candid disclosure" by the witnesses would not have affected the jury's verdict. Italiano himself had apprised the jury that he expected to benefit by testifying at petitioner's trial, and that both Kelsey and Goode had suggested to him that it would be in his best interest to testify (Pet. App. 7a). Thus, there would have been little or no added

impeachment value had the agents more fully disclosed their dealings with Italiano. Moreover, since petitioner's trial counsel testified at the hearing on the motion for a new trial that Italiano had informed him of the "pressures" to testify exerted on him by Agents Kelsey and Goode (N. Tr. 74-75),[9] he had sufficient information to cross-examine the agents in more detail on this point (Pet. App. 7a). Finally, Italiano did not recant any of his testimony, which directly implicated petitioner in the commission of the crimes and which was fully corroborated by the testimony of Terri Ovitt and of the surveillance agents, and by the results of the search (Pet. App. 7a-8a).

The apparent conflict in standards for awarding a new trial between *Butler* and the instant decision (and the cases cited above) does not require resolution by this Court at the present time. In the first place, the application of the *Butler* formulation in this case would not have produced a different result, since the court of appeals expressly found that Italiano's own testimony had apprised the jury of "any expectations on the part of Italiano which might have motivated him as a witness" (Pet. App. 8a). Accordingly, more candid testimony by Officers Goode and Kelsey would not have affected the jury's evaluation of Italiano's credibility or of any other material point. Moreover, as we have shown, the standard formulated in *Butler* is inconsistent with this Court's decision in *Giglio*, and we therefore believe it is uncertain that this erroneous formulation will be applied in future Ninth Circuit cases. Until it is, or until *Butler* is followed

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[9]"N. Tr." refers to the transcript of the hearing on the motion for a new trial.

in some other circuit, we think it is premature for this Court to undertake review for the purpose of reiterating or clarifying the *Giglio* standard.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

THE COURT: All right. I would like to give you this instruction.

Members of the Jury, in light of your report that you have been unable to agree on a verdict up to this time, the Court would like to give you this additional instruction.

While the verdict of a Jury must represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors and with a willingness to question his own judgment if he finds the larger majority of the jury takes a different view of the case than that which he himself takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment or that he should close his eyes to the arguments of the other jurors who are equally as honest and intelligent as himself.

So I charge you that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It is your duty to decide this case, if you can conscientiously do so. No juror, however, is expected to do violence to his own conscious [*sic*]. You should listen with an open mind to each other's arguments.

If a much larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable doubt, which made no impression upon the minds of so many jurors equally as honest and intelligent as himself.

And now, if on the other hand a majority of you are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

And now, having given to you these additional instructions, it is my hope that you will return to the jury room and endeavor to reach a verdict. And with these instructions in mind, I'm going to now ask you to return to the jury room and consider further your verdict.

If after further deliberations you are still unable to reach a verdict you may so advise me through your Foreman.